STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97G112

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PATRICK D. RYAN,

Complainant,

vs.

DEPARTMENT OF STATE, SECRETARY

OF

STATE,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on April 27, 1998. Respondent was represented by Elizabeth Weishaupl, Assistant Attorney General. Complainant appeared and was represented by Attorney Vonda Hall.

Complainant testified in his own behalf and called the following other witnesses: John Mulligan, Vickie Corder, Janet Davis and Karen Jackson, Personnel Officer, Office of the Secretary of State. Respondent called three witnesses: Freda Studenka, Friederike Sault and Victoria Buckley, Colorado Secretary of State.

Complainant's Exhibits H, I, J and K, and Respondent's Exhibits 1 through 7, 9, 10, 11, 12 and 19 were stipulated into evidence. Exhibits D, E, F, G and L were admitted over objection. Exhibits 20, 21 and 22 were admitted without objection.

MATTER APPEALED

Complainant appeals the denial of his grievance of a May 13, 1997 corrective action.

ISSUE

Whether the action of the respondent in imposing the corrective action was arbitrary, capricious or contrary to rule or law.

PROCEDURAL HISTORY

By Order dated January 30, 1998, the State Personnel Board adopted the preliminary recommendation of an administrative law judge and granted complainant's petition for hearing on the corrective action, particularly the alleged failure to adequately investigate the validity of the complaints registered against complainant by members of the public. Complainant's request for a hearing concerning his allegations of a hostile work environment and the denial of due process was denied.

FINDINGS OF FACT

1. Complainant Patrick Ryan has been a compliance investigator with the Office of the Secretary of State since December 3, 1990. As an investigator, his primary duty is to ensure compliance with the bingo/raffle laws and rules. For example, bingo games may be legally operated only by charitable, non-profit organizations that have been licensed for at least five years. Only members of the charitable organization may take part in the operation of a bingo hall.

- 2. In late January 1997, Ryan and another investigator entered the Arvada Bingo Corral to investigate their suspicion that some of the bingo hall employees were not volunteers and were not members of the pertinent charitable organization.
- 3. Freda Studenka was a player at the Bingo Corral when she saw Ryan following one of the bingo hall employees who was leaving the premises. Studenka placed herself between the worker and Ryan. When Ryan was writing down the license plate number of the worker's vehicle, Studenka stood in front of the license plate, saying to Ryan, "You don't need her license number." Ryan told Studenka that he could have her arrested by the Arvada police if she did not stop interfering.
- 4. Studenka asked Kevin Doyle, the bingo hall operations manager, who had been arguing with Ryan, if there was anything she could do to complain about not being allowed to play bingo. Doyle advised her to file a complaint and, about a week later, brought to her an official complaint form which she filled out. (Exhibit 21.)
- 5. Friederike Sault also was a player at the Bingo Corral that night. She became upset because Ryan interrupted her gambling by talking to Kevin Doyle. Ryan did not speak with Sault directly.
- 6. Sault was provided a complaint form at the bingo hall on February 13, to which she attached a typed statement. She does not know who did the typing, but the statement reflects her own words. (Exhibit 21.) She does not recall being contacted by the Secretary of State to discuss her complaint.
- 7. Vickie Corder is a player who arrived at the Bingo Corral after the incident took place and Ryan was gone. Doyle asked her

to help him prove that an incident occurred by copying a statement that he had written and by signing it as if it were her own complaint. She agreed, even though she had not been present at the time of the event. (Exhibit 21.) She trusted Doyle and wanted to keep the bingo hall open.

- 8. Corder subsequently lost her trust in Doyle and was sorry that she had hurt an innocent person by filing a false complaint. Afraid to go to the Secretary of State because Doyle had bragged about being a close friend of the Secretary, Corder contacted John Mulligan, president of The Bingo Company, and told him that she was concerned about having made a false complaint against Ryan. The next morning, Mulligan telephoned the Secretary's office and left the message that the complaints against Ryan were written by Kevin Doyle. He did not receive a return call.
- 9. In addition to the complaints from Studenka, Sault and Corder, written complaints were filed by Cynthia Mickens and Melvin Kehm, neither of whom testified at hearing. (Exhibit 21.) Secretary Buckley was unable to reach Kehm. She did not specifically reference Mickens in her testimony.
- 10. The person who was leaving while Ryan was trying to talk to her did not file a complaint and was not contacted by the Secretary of State.
- 11. Janet Davis was working at the Bingo Corral on the evening that Ryan was there. She observed that Ryan tried to speak to the employees, but they turned and walked away from him. Based upon her observations, Davis believes that nothing happened that was worth filing a complaint about. Ryan's behavior was not intimidating or harassing.

- 12. Buckley found the five written complaints on her desk in one brown envelope without a cover letter.
- 13. Buckley met with a representative of the Department of Personnel to review the written complaints. She was advised to place Ryan on administrative leave, which she did. She contacted the complainers to ask if there was anything they wanted to add. She was not able to reach all of them. Vickie Corder told her that she wished to withdraw her complaint. Buckley did not ask any questions and did not pursue the conversation.
- 14. Ryan told Secretary Buckley that the complaint letters had been written by Kevin Doyle. She did not investigate this allegation because Doyle, himself, had not filed a complaint.
- 15. On May 13, 1997, Secretary Buckley issued a corrective action to Ryan for rude, intimidating and harassing behavior towards members of the public based upon the subject incident. The corrective action required Ryan to prepare a written proposal of procedures designed to avoid such conduct in the future. (Exhibit 1.)
- 16. Ryan filed a grievance of the correction action (Exhibit 2), which was denied on June 13, 1997. (Exhibit 6.)

DISCUSSION

In an appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of proving by preponderant evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may

reverse respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. It is for the administrative law judge, as the fact finder, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Complainant carried his burden by showing that his conduct did not warrant the corrective action.

Through her testimony, Freda Studenka admitted that she interfered with complainant's investigation without provocation from him. He reacted to her interference, not the other way around. Friederike Sault was upset mainly because her gambling had been interrupted; she, herself, had no confrontation with Ryan. Janet Davis was present during the incident and did not observe any behavior worth complaining about. Evidence of the circumstances of the bingo hall employee leaving the hall is scant. No one contacted her, and she did not register a complaint.

Vickie Corder's testimony that she was provided a draft of a complaint by Doyle and asked to copy it in her own handwriting, even though she had not been present, casts suspicion over the validity of the other complaints. Corder should have been quizzed when she stated that she wished to withdraw her complaint. Someone should have talked to Doyle. The fact that all five complaints were presented anonymously to the Secretary in one envelope is noteworthy and should have aroused some curiosity, especially in view of complainant's assertion that his behavior was not unprofessional and that Doyle orchestrated the complaints.

On this record, the credible information available to the Secretary

of State was insufficient to justify a corrective action against complainant.

An award of attorney fees and costs is not warranted under C.R.S. \$24-50-125.5 of the State Personnel System Act.

CONCLUSIONS OF LAW

Respondent's action in imposing a corrective action upon complainant was arbitrary and capricious.

ORDER

Respondent is directed to rescind the corrective action and expunge it from complainant's personnel file.

DATED this ____ day of

May, 1998, at

Robert W. Thompson, Jr.

Denver, Colorado.

Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of May, 1998, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall Attorney at Law 1390 Logan Street, Suite 402 Denver, CO 80203

and in the interagency mail, addressed as follows:

Elizabeth A. Weishaupl
Assistant Attorney General
State Services Section
1525 Sherman Street, Fifth Floor
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